



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 10-01978 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Caroline Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

May 20, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant had three properties that went to foreclosure. The mortgage lenders cannot or are not pursuing any deficiency following the foreclosures. He has no other financial difficulties. Applicant has rebutted or mitigated the security concerns under financial considerations. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Statement of Reasons (SOR), the date of which is uncertain, detailing security concerns under Guideline F. financial considerations.

On October 14, 2010, Applicant answered the SOR and requested a hearing. On January 6, 2011, I was assigned the case. On January 26, 2011, DOHA issued a Notice of Hearing for the hearing held on February 9, 2011. The Government offered Exhibits (Ex.) 1 through 5, which were admitted into evidence without objection. Applicant testified, as did one additional witness, and submitted Exhibits A through I, which were admitted into evidence without objection. The record was held open to allow additional information from Applicant. On March 9, 2011, additional material was received. Department Counsel had no objection to the material, which was admitted into the record as Ex. J 1-8, for the documents, and as Ex. K 1-5, for the e-mails. On February 24, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations, with explanations. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact.

Applicant is a 31-year-old senior engineer who has worked for a defense contractor since April 2009, and is seeking to obtain a security clearance. Applicant's supervisor states Applicant has unique skill sets and is an exceptional employee. (Tr. 43) Applicant's co-workers, supervisors, and friends state: Applicant is absolutely reliable, honest, ethical, conscientious, very competent, and extremely detail oriented. (Ex. A – C)

Applicant owned three homes that went to foreclosure, two in state A and one in state B. He no longer lives in either state. In November 2003, Applicant, at age 24, purchased a home in State A and lived there until March 2005, when his job required him to move to State B. (Ex. 2) When he moved he decided to rent his home. In July 2005, Applicant, then age 26, obtained a \$175,000 adjustable rate mortgage with a monthly mortgage payment of \$1,200. (Tr. 97) In October 2006, the adjustable rate increased at the same time the tenants abandoned the property without prior notification. (Tr. 65) He was unable to continue his mortgage payments on the home and made an unsuccessful attempt to sell the home. In 2003, when he purchased the home for \$135,000, his annual salary was \$58,000 to \$60,000. (Tr. 65, 67) In 2006, when he refinanced the property his annual salary was \$75,000. (Tr. 68) The equity he received from the refinancing was used to pay off a vehicle, make payment on his credit card accounts, and for property maintenance. (Tr. 66)

Following foreclosure, the mortgage company forgave the debt and issued Applicant an IRS form 1099-A, Acquisition or Abandonment of Secured Property. (Ex. 2) The form indicates the fair market value of the property was \$165,000 and the balance owed was \$175,412. (Ex. 2) The lender charged off the past-due amount of \$10,297 (SOR 1.c) on the mortgage. Applicant included this amount on his state and federal tax

returns as ordinary income.² (Tr. 72) The lender's customer service center web site lists the unpaid balance on the home as zero. (Ex. F)

In June 2005, Applicant purchased a home a few blocks from his work in State B as his primary residence. (Tr. 101, Ex. 2) He obtained a \$308,000 adjustable rate first mortgage and a \$76,000 adjustable rate second mortgage for a total mortgage of \$384,000. (Tr. 95) His monthly mortgage was \$3,500 and his annual salary was \$75,000 plus a ten percent bonus. (Tr. 96) In 2006, the adjustable rate increased his mortgage payment from \$3,500 to \$4,500. He had no income from his rental property in his prior state and owed money as co-owner of a third property, discussed below. (Tr. 86) He was living on credit cards and was unable to make his monthly mortgage payments. The lender was unwilling to freeze his adjustable rate mortgage. (Tr. 81) He tried to sell the property and received an offer for 90 percent of the balance owed, which the mortgage lender rejected. The lender was unwilling to accept a "short" sale.³ (Tr. 82, 87) Thereafter, the offers to purchase the property became lower and lower. (Tr. 87) The property went to foreclosure. (Tr. 81)

In September 2005, Applicant decided to purchase another home with a co-buyer. Applicant had agreed to help his friend purchase the home as co-signer, help with the maintenance fees, and help with the monthly mortgage of \$4,000 or \$5,000. (Tr. 76, 77) They agreed to split any profit when the house sold. (Tr. 76, 92) Two adjustable rate mortgages totaling \$550,000 were obtained to purchase this home. One was 80% of the purchase price and the other for 20% of the price. His friend moved into the property as his primary residence and rented out rooms. (Tr. 75, 76) At one time, there were five to ten tenants in the six-bedroom home. (Tr. 93) Applicant also moved in to the house paying rent to the co-owner. He did so because he was able to rent his home in State B for a very high rent due to the housing market where that house was located. (Tr. 90) When the tenants moved out of his home, he was forced to leave the house he co-owned, stop paying rent to his friend the co-owner, and move back to his other home. (Tr. 90)

In June 2006, the State B housing market began a significant decline. In June 2007, Applicant realized the home value had declined by 30% and his adjustable rate increased by 25%. (Ex. 2) With the excess of real estate on the market, rooms his friend had previously been able to rent out for \$800 monthly were renting for \$400. (Tr. 79) His friend was having trouble finding and keeping tenants in the property. (Tr. 78) In June 2007, Applicant left the state, moved in with his parents, and stopped making mortgage payments. (Tr. 88, Ex. 2) He has not returned to state A or state B. He had been \$12,849 past due on the \$440,000 mortgage (SOR 1.b).The house went to foreclosure

² If the property is not the borrower's main residence, any amount of cancelled debt is ordinary income to be included on the borrower's tax returns.

³ The foreclosure occurred early in the housing market crash and the lenders were unwilling to allow "short" sales which became more common as the housing crisis continued. The lender did want to pay Applicant to maintain the property. Applicant refused the money, but continued maintaining the home. (Tr. 84)

and was sold for \$299,000. His February 2011 credit bureau report (CBR) lists the account with a zero balance and zero past due. (Ex. G)

State B Code of Civil Procedure sections 580b⁴ and 580d,⁵ states lenders are forbidden from recovering deficiency judgments on purchase money loans given to consumer borrowers to purchase personal dwellings. (Ex. 2) The law does not require the property to be the borrower's primary residence. Thus, the creditors cannot attempt to collect from Applicant, and if they did so, he could seek damages in a civil action. Neither Applicant nor his co-owner friend have received any letters from the lenders demanding payment. (Tr. 84)

Applicant was always open about the foreclosures. (Tr. 107) In his 2009 interviews he fully explained his real estate holdings and problems associated with them. In September 2010,⁶ when Applicant completed his Electronic Questionnaires for Investigations Processing (e-QIP) he listed the two State B foreclosures, but not the State A foreclosure. (Ex. 1, Ex. 2)

From June 2007 through August 2007, Applicant was unemployed. (Ex. 2) From April 2008 through September 2008, Applicant was unemployed and collected \$475 weekly unemployment compensation. (Ex. 2) He was also unemployed and collecting unemployment compensation from January 2009 through April 2009, when he started his current employment. (Tr. 2) In 2009, Applicant's wife⁷ qualified for a 30-year fixed rate mortgage and purchased a \$134,000 home. (Ex. E, Ex. J-7) They are current on the \$1,176 monthly mortgage payments. (Tr. 113)

When the mortgages were incurred, Applicant was single and his annual salary was between \$58,000 and \$75,000. His wife's annual salary is \$37,000 and she has excellent credit. (Tr. 111) The household net monthly income for Applicant is \$7,000. The monthly expenses and debt payments total \$3,000, which leaves a monthly net remainder of discretionary income of \$4,000. (Ex. D) Part of this discretionary income goes to help his parents with their expenses. (Tr. 124) His wife drives a 2001 Honda

⁴ State B Code of Civil Procedure, Section 580.b: No deficiency judgment property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser. shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real

⁵ State B Code of Civil Procedure, Section 580.d: No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.

⁶ It is noted that he was interviewed by the Office of Personnel Management (OPM) in October 2009 and December 2009, which predates the September 2010 e-QIP.

⁷ Applicant asserts he was married in the church so there are no legal documents regarding his marriage. (Tr. 130)

and he drives a 2005 Chevrolet, both of which are paid for. (Tr. 110) His wife put him on one of her credit cards and that card has a \$144 balance. (Tr. 111)

Applicant has received financial counseling, he does online financial research, and uses his bank's web site. (Tr. 114) He learned much from listening to Dave Ramsey's financial advice. He has an emergency fund sufficient to cover three month's of expenses. (Tr. 117) He has \$12,338 in his retirement account and his wife has \$3,149 in her 401(k) plan. ((Tr. 116, Ex. J-2, Ex. J-3) They have \$2,754 in checking and \$2,600 in savings. (Ex. J-4) His wife has \$8,000 in a second saving account. (Ex. J-5) He is current on his student loans on which he makes \$142 monthly payments. (Ex. D, Ex. I)

The properties were purchased when Applicant was 24 and 26. He acknowledged he had no prior experience as a landlord and was not an educated landlord or real estate investor. (Tr. 98) He failed to realize the hazards associated with being a landlord and being at the mercy of the market. Applicant asserted that when he made his purchases he was young, single, full of energy, and thought the time was right to take the opportunity and the risk to purchase real estate. (Tr. 98, 115) He had been a straight A student throughout high school and college. (Tr.113, Ex. J-8) His job as an engineer was going well and he was making a good income. (Tr. 104) He was doing better than most people he knew who were his age and at his stage in life. (Tr. 105) He believed it was the right time to invest in real estate. (Tr. 105) Not understanding the market, he assumed that the real estate market would continue to rise. (Tr. 80) He is now married and has an eight-month-old son. (Tr. 116)

Applicant has learned he needs guidance when making investments. (Tr. 132) He has learned to slow down and understand what is right for him. He is still confident, but his family's well being takes priority. (Tr. 133) He understands his actions affect not only him, but also his family. He has learned much about finance and how banks work. (Tr. 136)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available,

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant had three mortgages that went to foreclosure. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant owned three homes with adjustable rate mortgages. With the sharp decline in the housing market, the increase in his adjustable rates, and the lack of tenants in his rental property he was unable to make his mortgage payments. The properties went to foreclosure. Following foreclosure, the lenders were either prevented by state law or chose to not pursue the deficiency on the properties. State law prohibits

the mortgage company from collecting on any deficiency following the foreclosure of his property on the State B properties.

Applicant's home in State A went to foreclosure when his adjustable rate mortgage increased and his tenants left. The lender has cancelled Applicant's \$10,297 debt on the mortgage and issued an IRS form 1099-A, Acquisition or Abandonment of Secured Property. The cancellation of debt is ordinary income, which Applicant included on his state and federal tax returns as ordinary income. Additionally, his CBR lists the lender as showing Applicant has a zero balance and zero past due owed on this account. If the creditor issued an IRS form 1099-A, the creditor does not intend to pursue further collection of the debt. Applicant's only remaining liability on this debt was the amount of federal and state tax this amount of ordinary income generated.

Applicant's three foreclosures are recent, but were caused by circumstances beyond his control. It is noted that Applicant's annual income was less than \$100,000 when he secured the three mortgages, which totaled more than a million dollars. The wisdom of such action is subject to debate, and will be discussed later, but he owes nothing on the properties and all his other finances are under control.

Under AG ¶ 20(a), Applicant's financial problems, as previously stated, resulted from the decline in the housing market, the inability to obtain and keep tenants, and the increase in his adjustable rates. These are events unlikely to recur. His wife has purchased a modest \$134,000 home with a fixed-rate mortgage solely in her name. The mitigating condition listed in AG ¶ 20(a) applies.

The sharp decline in housing values was unforeseen. However, the possibility that adjustable rate mortgages would increase was foreseeable, as was the possibility that he, as a landlord, would experience times when rental property was not rented. However, the housing market in state B gave not indication that housing prices were going anywhere buy up, and at a fast rate. In a period of less than two years, from June 2007 through April 2009, Applicant was unemployed more than a year. He was unemployed from June 2007 through August 2007; April 2008 through September 2008; and January 2009 through April 2009. The market down turn and his unemployment were conditions largely beyond his control. When Applicant was living on unemployment compensation it is difficult to see what more he could have done to avoid the foreclosures. He immediately tried to sell the properties, the lender declined the "short" sale, and the 30% decline in value prevented any other offers. The mitigating condition listed in AG ¶ 20(b) applies.

The evidence fails to show any financial delinquencies other than the foreclosures. Now that the properties have gone to foreclosure and the lenders are not pursuing any deficiency, Applicant's finances are under control. Applicant's current CBR reflects he is paying his obligations as agreed. The mitigating condition listed in AG ¶ 20(c) applies.

The debt has been “otherwise resolved,” however the foreclosures do not represent a good-faith effort to repay overdue creditors, nor were they an action “initiated by Applicant,” which is required for AG ¶ 20(d) to apply. Applicant incurred an obligation to pay the mortgages, which circumstances beyond his control prevented him from doing. State law prohibits the mortgage lenders from collecting any deficiency. The mortgage lender on the other property is not attempting to collect the \$10,000 difference between the fair market value and the amount owed at the time of foreclosure. Should any of the mortgage lenders pursue collection, Applicant would have a reasonable basis to dispute the legitimacy of the debts. In that case, the mitigating condition listed in AG ¶ 20(e) would apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The debts incurred were not the type that indicates poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Money was not spent frivolously. The SOR debts were not incurred on luxuries, but for homes.

In 2003, Applicant purchased a home and lived there until his job required him to move to another state. His decision to rent the property instead of selling it when he moved was not unusual and frequently occurs. In June 2005, when he arrived at his new location, he purchased a home a few blocks from work. Neither home purchase appears to be frivolous or what is normally considered a luxury.

Applicant was young, single, and very confident, in part, because he had been an A student throughout high school and college and was doing well in his engineering job. Compared to others of his age and stage in life, he felt he was doing well. He believed

the time was right to venture into real estate purchases. At age 26 he was not sufficiently savvy to understand the risks associated with adjustable-rate mortgages, being a landlord, and a volatile housing market. He failed to understand making such purchases on his income was possible only if all factors continued in his favor.

In September 2005, he made the decision to become part owner in a third piece of property. The market at the time appeared to justify such a purchase. Property in state B was increasing at a rate that entering the market at a later time might be prohibitive. He and the co-owner were each responsible for the mortgage, but tenants would help defray the monthly cost. In June 2006, the bottom fell out of the housing market. Rental income, when tenants could be secured, declined sharply because of all the homes on the market. It is only an understanding of pitfalls of adjustable rate mortgages and the volatility of the housing market, and hindsight that this third purchase appears to be unreasonable.

The issue is not simply whether all his debts are paid, but whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1).) Applicant does not appear to be living beyond his means. He owns a 2001 Honda and a 2005 Chevrolet, which are paid for. His only outstanding debt is his student loan obligation, on which his \$140 monthly payments are current. He is not on the mortgage note for their current house for which the \$1,200 monthly mortgage payments are current. The current mortgage is not an adjustable mortgage, but a fixed rate income. He maintains an emergency fund sufficient to cover three months of expenses. The household has \$4,000 per month in discretionary income. Both he and his wife have retirement plans and they have money in savings. He better understand finance and the associated risks. He is not the same person he was then the purchased the properties. He is now 31 years old, a father, and understands actions no longer affect just him, but also his family. The way he looks at risk and his finances has changed.

The mortgage lenders on the foreclosed properties cannot or are not pursuing any deficiency following the foreclosures. These debts cannot be a source of improper pressure or duress.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Financial Considerations: FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge